September 23, 1957
Opinion No. 57-121

REQUESTED BY: The Honorable David H. Campbell
Member, House of Representatives

OPINION BY: ROBERT MORRISON, The Attorney General

QUESTION: 1. Is it lawful for the Arizona Employment Security Commission to grant unemployment benefits to a claimant who has rejected non-union employment on the sole ground that the acceptance of such non-union employment would violate union rules?

CONCLUSION: 1. No. (qualified)

QUESTION: 2. The policy manual of the Employment Security Commission reads in part as follows: "Union requirements may narrow a person's field of employment. A job which a union member can or will accept must meet certain standards usually different from those imposed on workers in general...the restrictions imposed on workers by their unions are recognized."

Is it the opinion of the Attorney General that this section of the Employment Security Commission policy accepts union restrictions which are in violation of Section 23-1305, A.R.S., which prohibits a conspiracy to induce persons to refuse to work with persons not members of a labor organization?

CONCLUSION: 2. No.

QUESTION: 3. May any state or political subdivision, board or commission enact rules, regulations or policies which are in conflict with any section of the Arizona Revised Statutes?

CONCLUSION: 3. No.

QUESTION: 4. What remedies exist under law to correct a situation where rules, regulations or policies are enacted which are in opposition to existing state laws?

CONCLUSION: 4. See body of opinion.

QUESTION ONE

A.R.S. § 23-776 provides:

"§ 23-776. Disqualification from benefits for failure to accept suitable work; exceptions

A. An individual shall be disqualified for benefits if the commission finds he has failed without cause either to apply for available, suitable work, when so directed by the employment office or the commission, or to accept suitable work when offered him, or to return to his customary self-employment when so directed by the commission. The disqualification shall continue for the week in which the failure occurred and for not more than five weeks immediately following such week, as determined by the commission according to the circumstances in each case.

B. In determining whether or not work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation and the distance of the available work from his residence.

C. Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to an otherwise eligible individual for refusing to accept new work under any of the following conditions:

1. If the position offered is vacant due directly to a strike, lockout or other labor dispute.

2. If the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.

3. If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining a bona fide labor organization."

Paragraph A of the foregoing statute clearly prohibits the granting of benefits to a claimant who has refused "to accept suitable work when offered him" for the week in which he rejects "suitable work without

cause" and for an additional period not to exceed five weeks immediately following such week.

Paragraph B of Section 23-776, supra, makes it mandatory that the commission in determining whether or not work is suitable, consider, among other things, "length of unemployment and prospects for securing local work in his customary occupation." Obviously, this paragraph grants broad discretionary powers to the commission to determine from the facts of each case whether the rejected work was suitable. The Courts have held that where a determination has been committed to the discretion of a particular administrative officer or body, the decision of such officer or body ordinarily will not be reviewed, nor will the Court substitute its judgment for that of the administrative body unless such discretion has been clearly and palpably abused or exercised in an arbitrary, capricious, fraudulent or unreasonable manner. 73 C.J.S. 560-566.

It is apparent from the foregoing then that if administrative discretion has been exercised in a reasonable manner and the administrative body has placed an interpretation on a statute susceptible of such interpretation, such interpretation by the administrative body and the exercise of discretion thereon will not be disturbed.

Furthermore, if the work offered comes within the exempting provisions of A.R.S. § 23-776 C, supra, then, in that event, the rejection of proffered work would not operate to disqualify the claimant from unemployment benefits.

As can be seen, nowhere in the foregoing statute does it empower the Employment Security Commission to exempt any claimant from the penalties imposed by 23-776 A, supra, in the event a claimant refuses suitable work on the sole ground (without something more), that acceptance of such work would violate his union rules.

Therefore, it is my opinion, unless the proffered work falls within the scope of A.R.S. § 23-776 B and/or C, that it would be unlawful for the Employment Security Commission to grant unemployment benefits to claimants without imposing the penalties provided for in Section 23-776 A, supra, when the sole ground for refusing to accept suitable work has been that the acceptance of such work would violate claimant's union rules.

It must also be remembered that paragraph "A" only exacts a penalty by disqualification for the week in which the rejection of suitable work without cause occurred and for an additional period not to exceed five weeks. Thereafter, once the penalty period has expired the claimant becomes eligible to draw benefits for the balance of the period as provided by law.

The foregoing opinion does not purport to deal fully with the subject

of eligibility, availability or disqualification, but only with the narrow question of whether the rejection of non-union work by a union member on the sole ground that the acceptance of such non-union work would violate his union rules and hence subject him to either disciplinary action or expulsion from the union. In order that the full impact of these subjects can be understood as they relate to granting or rejecting unemployment benefits, the following quotes from the Arizona Supreme Court case of Beaman v. Safeway Stores (1955), 78 Ariz. 195, 277 P.2d 1010, may be helpful and therefore have been supplied.

> "We do not believe the court was correct in finding the claimants ineligible because of unavailability for work. Generally, the courts test whether one is available for work by whether the claimant is able, willing and ready to accept suitable work which he does not have good cause to refuse and is genuinely attached to the labor market.
> * * *
>
> This does not mean necessarily that there are no possible conditions under which one may be considered available although not willing to accept certain suitable employment. Stated another way, he is eligible even if he refuses to accept suitable work without good cause if such refusal does not effectively remove his services from the labor market. If the refusal is for a cause and upon such conditions as so restrict his willingness to work that his services are rendered unmarketable, he has removed himself from the labor market and is ineligible. Unemployment Compensation Commission v. Tomko, 192 Va. 463, 65 S.E.2d 524, 25 A.L.R.2d 1071. In the event such refusal merely limits the field of suitable work which he will not accept to an individual employer, he might be disqualified but he could not be said to be unavailable and removed from the labor market unless the circumstances warrant the conclusion he is unwilling in general to accept suitable work.
> * * * * *".
> (Emphasis supplied)

QUESTION TWO

A.R.S. § 23-1305, reads as follows:

> "A combination or conspiracy by two or more persons to cause the discharge of any person or to cause him to be denied employment because he is not a member of a labor organization by inducing or attempting to induce any other person to refuse to work with such person, is illegal."

Before making a determination of Question No. 2, it is necessary to construe the foregoing section.

In People v. Sowma, 299 N.Y.S. 523, the Court in construing the word "combination" said:

> "A criminal 'combination' or conspiracy' necessarily involves two or more people since one cannot conspire by himself."

In Brownsville Glass Co. v. Appert Glass Co., 136 Fed. 240, the Court said:

> "A 'combination' is the union or association or two or more persons or parties for the attainment of some common end.'"

The word conspiracy has been construed by the courts as follows:

> "A 'conspiracy' is a combination or agreement between two or more persons to do an unlawful act." Herring v. State, Ga. App., 95 S.E.2d 21.

> "'Conspiracy' is not synonymous with 'aiding and abetting' or 'participating;' and whereas conspiracy implies an agreement to commit a crime, to aid and abet requires actual participation in act constituting the offense." People v. Malotte, Cal. 292 P.2d 517, 521.

> "Essential elements of a 'conspiracy' are a combination of two or more persons, a real agreement or confederation with a common design, and existence of an unlawful purpose or a lawful purpose to be achieved by unlawful means." Naylor v. Harkins, 99 A.2d 849, 854.

The courts have said that the crime of conspiracy consists of several distinct elements. The first of these is that there must be a combination of two or more persons to constitute a conspiracy; one may plan or plot alone but he cannot conspire alone. The second element is that there must be a real agreement, combination, or confederation with a common design. The third essential is the existence of an unlawful purpose or act to be accomplished or done, or a lawful purpose to be accomplished by unlawful means. 11 Am.Jur. § 4.

15 C.J.S. § 35 sets out the elements of a conspiracy as:

"1. An offense to be accomplished.

2. A plan or scheme embodying means to accomplish that object.

3. An agreement or understanding between two or more of the defendants whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement or by any effectual means.

4. In jurisdictions where the statutes so require, an overt act." (Arizona requires by Section 13-332 - an overt act).

The courts have also held that the essential elements of a criminal or civil conspiracy are the same. 11 Am.Jur. § 45.

It goes without saying that Section 23-1305, supra, is clear and unambiguous. It simply means that it is illegal if two or more individuals, persons, corporations, etc. agree to cause the discharge of a person or to cause him to be denied employment because he is not a member of a labor organization by inducing or attempting to induce a third person to refuse to work with such person.

The mere fact that a public body acting in a way that might give aid and comfort to someone who is bent on accomplishing an illegal object is not of itself sufficient to meet the requirements of an "agreement" in a conspiracy. In the case of United States v. Armour & Co., 48 F. Supp. 801, the Court said:

"Because of the peculiar nature of a conspiracy and the difficult position in which a defendant finds himself to defend against generalities or blanket allegations, the facts constituting the agreement which resulted in the conspiracy must be alleged and no element of a conspiracy has been more generally recognized by the courts than that an alleged conspirator may not be considered a part of the conspiracy unless some act of his in agreement with another defendant constituted an agreement to do the things alleged as acts of the conspirators. In other words, a number of defendants might perform illegal acts and the performance of such acts would not indicate a conspiracy. Mere uniformity of action in the performance of acts would not constitute a conspiracy. There must first be an agreement to do certain illegal acts or to do legal acts in an illegal manner, before a conspiracy is established. * * *" (Italics underlined).

It might be well to oonsider at this point actual cases and policies administered and carried out by the Arizona Employment Security Commission to determine if there is any basis from which a reasonable person could draw the conclusion that a conspiracy exists between the Commission and unions.

Case No. 2164 heard by the Appeal Tribunal of the Employment Security Commission sheds considerable light on the subject. The Tribunal said in that case, among other things:

> "In the instant case the claimant placed certain severe restrictions on her employability during the period of her filing. She limited the type of work she would accept to employment at a union establishment in the Mesa area where the major portion of the work in her line is non-union. ... Therefore, it is the opinion of the tribunal that the restrictions placed by the claimant on her availability so narrowed her employability she was precluded from accepting suitable work. Such limitation of availability constituted a removal from the labor market. It is not the intent of the Employment Security Commission to pay benefits to those who unduly restrict their employability."

In Case No. 5071, an appeal case before the Appeal Tribunal, commonly known as the Fisher-McKusick case, growing out of a controversy at Globe, Arizona, the following testimony at pages 19 and 20 in the Transcript of Testimony might be helpful:

"MR. FISHER: Well, I had been working for a construction company over there at this highway patrol office, on the highway over here by the school; I knew there was some more work there, and I was in hopes that I would get back to it that week, which I did.

CHAIRMAN WOOD: At the time you were talking with Mr. McKusick over the telephone, were you under instructions to report back to that job at a certain time?

MR. FISHER: Not exactly instructions. Jim said for me to check with him, and when he was ready for these forms, he would put me back on. I knew there was a little more work over there.

"MR. MORRELL: You have held employment since Mr. McKusick offered you the job, have you not?

MR. FISHER: Oh, yes, sir. Things are not that bad.

MR. MORRELL: Could you have obtained that employment had you worked for Mr. McKusick?

MR. FISHER: No, sir, I could not.

MR. MORRELL: Does your union have a rule or by-law of some sort, that you are not supposed to work for a contractor unless he has an agreement with them?

MR. FISHER: That's right.

MR. MORRELL: That's all I have."

From the foregoing testimony, the reader of this opinion can see that Mr. Fisher was expecting to return to his former employer, who was a union employer, and did so in the very week in which he rejected Mr. McKusick's offer of employment. The testimony further shows that he could not have returned to work for his former employer had he accepted the employment offered by Mr. McKusick.

Further, the Transcript of Testimony also reflects the fact that Mr. McKusick had been aware for several years that whenever a union carpenter worked on a non-union job, the union carpenter would be subject to either fine or expulsion from the union, or both, and that he was aware of this condition of union membership at the time he asked Mr. Fisher to work for him. In addition, the testimony developed at that hearing that there was no representation as to how long the employment would last, but, on the contrary, the testimony clearly indicated that the offer of employment of Mr. McKusick was temporary in nature.

The Arizona Employment Security Commission took certain other action in the Fisher-McKusick case which is pertinent on the question of conspiracy. The following are excerpts from a letter received from the Regional office of the U. S. Department of Labor:

"U. S. DEPARTMENT OF LABOR
Bureau of Employment Security
Regional Office
Room 506, 630 Sansome Street
San Francisco 11, California

In Reply Refer
To 36A

July 30, 1957

"Mr. Bruce Parkinson, Director
Unemployment Compensation Division
Employment Security Commission
Post Office Box 6123
Phoenix, Arizona

Dear Mr. Parkinson:

In answer to this office's request, the Bureau has forwarded comments on your Appeal Case No. 5071, Claim of Ellis Fisher, as follows:

* * * * *

'The Federal interpretation of 'as a condition of being employed,' limiting it to a condition imposed by the employer, was spelled out in the Bureau's statement of 'Principles Underlying the Suitable Work Disqualification' (attachment to U.C.P.L. No. 101, November 26, 1945):

'D. The Freedom-of-Association Standard

'The last general statutory standard provides that no benefits shall be denied for the failure to accept new work if, as a condition of being employed, the worker would have to join a company union, or resign from or refrain from joining a bona fide labor union.

'Limitation of Provision.--The phrase 'condition of being employed' primarily refers to a condition imposed by the employer as a result of prior agreements with other employers and labor unions. Thus, where the employer has a closed shop agreement with a union, the observance of union membership rules becomes a condition of being employed. It is not usually held to refer to instances where the claimant's own union, having no relationship with the employer, would compel him to resign were he to accept the work offered him.

' 'Condition' of being employed may be distinguished from the 'results' of being employed.

The 'results' of being employed include violation of rules of the union to which claimant belongs resulting from his accepting the particular offer of work. The benefit decisions and court cases provide a number of reasons for thus distinguishing between the two.

'It is often said that the claimant's membership in a union at the time the work is offered him is his personal affair, and his desire to abide by his union's rules which may provide the reason for his not accepting the offer of work is also his personal affair. It is often pointed out that an outside union may change its rules and thus affect the application of the law. Particular rules of unions may be considered to be in violation of national policy or not consistent with the best economic theory and practices.

'Other reasons, however, may be behind the distinction between 'conditions' and 'result' of being employed. The bill which was presented to the Congress of the United States and which eventually became the Social Security Act, originally referred to protection from disqualification of the worker 'if acceptance of such employment would either require the employee to join a company union or would interfere with his joining or retaining membership in any bona fide union.' (Underlining supplied.) This language was later changed to its present form: 'if as a condition of being employed . . .' The original phrase 'acceptance of such employment' more clearly encompasses refusals by the worker of work which, if he accepts, will cause expulsion from the union of which he is already a member. By contrast, the present language seems designed merely to prevent unemployment compensation from aiding the efforts of some employers attempting to disrupt or destroy already existing union relationships.

'But even though the worker's refusal of the work because of the resulting violation of his union's rules is not protected under this particular standard, the violation involved in his accepting the work may make the work unsuitable, or he may have good cause for refusing it.'

"Our conclusion that section 3304(a) (5) (C) of the Internal Revenue Code does not protect a claimant from disqualification when he refuses a job because acceptance would violate his union rules does not prevent a State from allowing him benefits. Under its own State law, a State agency may reasonably find that in such circumstances the claimant did not refuse suitable work without good cause.

We have no question about the soundness of the Appeal Tribunal's decision to the extent that it rests upon a finding that the claimant had good cause to refuse a job when his union would have penalized him for accepting it. The Tribunal's pointed quotation of section 23-776 C. 3 of the Arizona law seems to suggest that the freedom-of-association standard is one of the reasons for the Tribunal's conclusion. While the state agency is free so to interpret the Arizona law, it is not required to do so in order to meet the Federal standard."

Sincerely yours,

Glenn E. Brockway
Regional Director

By /s/ Albert J. Miller
Albert J. Miller."

Section 475.5, Case 1, of the Policy Manual contains further information pertinent to the question of conspiracy as follows:

"A carpenter who lacked union membership stated he would not join the local carpenters union because he was unable to pay the required initiation fee and because he preferred to obtain his jobs solely through his own efforts. He restricted himself to carpenter work and stated he would accept the rate commonly paid non-union carpenters in the locality which was lower than the union rate. About one-third of the carpenter work in the locality which is heavily populated is non-union. He sought that work by advertising in the want ad columns of the local newspaper and by contacting employers on construction sites.

Decision: The claimant is available for work. He has restricted himself to non-union carpenter work. He is qualified for and is actively seeking such work. It exists in substantial quantity in the area. Since a substantial amount of work to which he restricts himself exists in the area, his restriction is not unreasonable and does not remove him from the labor market."

It would be difficult for a reasonable person to hold, in the face of the foregoing facts quoted herein together with the applicable law, that the administration practices of the Arizona Employment Security Commission amount to conspiracy. If such conclusion could be justified, then it must also be assumed that the Commission and non-union workers and employers have entered into a conspiracy against unions.

It is, therefore, my opinion, with due consideration of the facts cited herein, that the policy of the Commission does not constitute conspiracy and is not violative of A.R.S. Section 23-1305.

(I have called to the attention of the Arizona Employment Security Commission that the scope of the language contained in their policy manual dealing with union relations is too broad and should contain qualifying language. I expect that appropriate changes will be made to conform to the law).

QUESTIONS THREE AND FOUR

The answer to Question No. 3 necessarily must be in the negative, and it needs no supporting authority because it is fundamental in the law that no state or political subdivision, board or commission may enact rules regulations or policies which are in conflict with any section of the Arizona Revised Statutes.

As to Question No. 4, court action enjoining the public body from such practices would be available.

If rules and regulations are adopted with notice that they are violative of state law, appointive officers might, under proper facts, be removed from office for cause after hearing. No attempt is made herein to cover every possible situation. Other remedies might be available depending upon the particular facts and circumstances involved.

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